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In the Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Petitioner discriminatorily selected an employee for layoff because he engaged in union-organizing activity protected by the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* The National Labor Relations Board (Board) found that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), in laying off that employee. Petitioner subsequently learned that the laid-off employee was an undocumented alien not authorized to be employed in the United States. The Board ordered petitioner to pay back pay to the employee, but only up to the date on which petitioner learned that the employee had used fraudulent identification documents to secure his employment with petitioner. The question presented is whether the Board's order awarding back pay to the employee up to that date is a proper exercise of the Board's remedial authority.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-36a) is reported at 237 F.3d 639. The prior opinion of the court of appeals panel (Pet. App. 37a-77a) is reported at 208 F.3d 229. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 78a-87a) and the decision of the administrative law judge (Pet. App. 88a-95a) are reported at 326 N.L.R.B. 1060. Prior decisions and orders of the Board are reported at 314 N.L.R.B. 683 and 306 N.L.R.B. 100.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 16, 2001. The petition for a writ of certiorari was filed on April 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court held, in agreement with the National Labor Relations Board (Board), that an undocumented alien worker is entitled to the protections of the National Labor Relations Act (NLRA or Act) as an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). See 467 U.S. at 891-894. The Court also sustained the Board's conclusion in that case that the employer had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), when it constructively discharged its undocumented alien workers by reporting them to the Immigration and Naturalization Service (INS), which resulted in the employees' arrest and immediate voluntary departure from the United States to Mexico in lieu of deportation. See 467 U.S. at 886-888, 898-906.

As a remedy for the violation in the *Sure-Tan* case, the Board "ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902. The court of appeals, seeking to reconcile the Board's conventional remedies with the policies underlying the Nation's immigration laws, modified the Board's order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement," and, in computing back pay, to deny

back pay to discriminatees "unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *NLRB* v. *Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982), rev'd in part, 467 U.S. 883 (1984); see also 467 U.S. at 889. Because of the likelihood that the discriminatees might not "have been lawfully available for employment in the United States prior to the date of the new offers of reinstatement which will be required" and thus would "receive no backpay," the court of appeals further concluded that it would best effectuate the policies of the Act "to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs." 672 F.2d at 606. Estimating that the discriminatees would have continued working for the employer for at least six months until the INS would have independently detected their presence in the United States, the court of appeals ordered that each discriminatee receive back pay for that minimum period of time. *Ibid.*; see also 467 U.S. at 890.

This Court held that the court of appeals' "imposition of this minimum [six-month] backpay award * * * constitutes pure speculation and does not comport with the general reparative policies of the NLRA." *Sure-Tan*, 467 U.S. at 901. As this Court explained, the court of appeals had "'estimated' an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS." *Id.* at 902 n.11. This Court agreed with the court of appeals, however, that "the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States." *Id.* at 902-903. That

condition on the discriminatees' remedy, the Court stated, was appropriate to accommodate "the objective of deterring unauthorized immigration" reflected in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 467 U.S. at 903.[1] The Court added (*ibid.*):

> By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

b. Subsequent to *Sure-Tan*, Congress amended the INA by enacting the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In a substantial change from prior law (see note 1, *supra*), IRCA made it unlawful for employers knowingly to hire aliens not authorized to obtain employment in the United States. Congress provided in IRCA that "[i]t is unlawful for a person or other entity—(A) to hire * * * for employment in the United States an alien knowing the alien is an unauthorized alien * * * or (B) to hire for employment in the United States an individual without complying with the requirements of subsection (b)." 8 U.S.C. 1324a(a)(1). "[T]he requirements of subsection (b)"

[1] The Court observed that, under the version of the INA then in effect, "[t]he central concern of the INA [was] with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," and the INA reflected at most "a peripheral concern with employment of illegal entrants." *Sure-Tan*, 467 U.S. at 892 (quoting *De Canas* v. *Bica*, 424 U.S. 351, 359-360 (1976)).

referred to in Section 1324a(a)(1)(B) are set forth in Section 1324a(b), which establishes an "employment verification system" that obligates each employer to examine specified kinds of documents to verify that a person whom it wishes to hire is not an "unauthorized alien." 8 U.S.C. 1324a(b) (1994 & Supp. V 1999). Section 1324a(a)(2) of Title 8, as added by IRCA, further provides that "[i]t is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1) [*i.e.*, Section 1324a(a)(1)], to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." 8 U.S.C. 1324a(a)(2). An employer who violates Section 1324a may be subject to civil and criminal penalties. See 8 U.S.C. 1324a(e)(4) and (5) (civil penalties); 8 U.S.C. 1324a(f)(1) (criminal penalties). Those penalties apply, however, only if the employer has knowingly hired or retained an undocumented alien or has not complied with the employment verification system.

In addition to placing new restrictions on the hiring practices of employers, IRCA also prohibits certain conduct by individuals seeking employment. Under 18 U.S.C. 1546(b), as added by IRCA, it is a criminal offense for a person to use "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] * * * that the document is false, * * * for the purpose of satisfying a requirement of [Section 1324a(b)]." 18 U.S.C. 1546(b)(1) and (2).[2]

[2] Petitioner incorrectly states (Pet. 11) that this criminal provision respecting the misuse of identification documents by employees was part of the INA "[p]rior to IRCA." Rather, that provision was enacted in 1986 as part of IRCA. Petitioner also

c. In *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995), aff'd, 134 F.3d 50 (2d Cir. 1997), the Board fashioned a conditional reinstatement and back pay remedy for application in cases where, contrary to IRCA, the employer hires individuals knowing that they are not authorized to work in the United States, and then subsequently discharges those employees because of their protected union activity, in violation of Section 8(a)(3) of the NLRA. In that situation, the Board has required the employer to pay the discriminatees back pay from the date of their discharge to the date when they are reinstated, "subject to compliance with the [employer's] normal obligations under IRCA" to verify their eligibility for employment in the United States, or when the discriminatees, after a reasonable period of time, fail to produce "the documents enabling the [employer] to meet its obligations under IRCA," whichever date is earlier. 320 N.L.R.B. at 416; see also Pet. App. 83a.

The Board in *A.P.R.A. Fuel* expressly noted, however, that a different remedy would apply in a situation where, unlike the case before it, the employer did *not* know, at the time of hire, that the employee whom it discharged in violation of the NLRA was not authorized to work in the United States under IRCA, but rather, learns of that fact only after the discharge. See 320 N.L.R.B. at 415 n.39, 416 n.44. The Board explained:

> Under established Board law, if an employer satisfies its burden of establishing that the discriminatee

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incorrectly states (Pet. 11) that a separate provision respecting the misuse of identification documents, codified at 8 U.S.C. 1324c(a) (1994 & Supp. V 1999), was enacted in 1986 by IRCA. Rather, that provision was enacted into law by the Immigration Act of 1990, Pub. L. No. 101-649, § 544(a), 104 Stat. 5059-5061.

> engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct.

Id. at 416 n.44 (internal quotation marks and citations omitted). The instant case involves the application of that limited back pay remedy.

2. a. Petitioner produces polyvinyl chloride pellets at a plant in Paramount, California. In May 1988, petitioner hired Jose Castro to work as a compounder in the plant. Pet. App. 40a; *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 101, 104 (1992). Prior to hiring Castro, petitioner, as required by IRCA (see pp. 4-5, *supra*), examined documents tendered by Castro to verify that he was authorized to work in the United States. Those documents appeared to be genuine and related to the person presenting them. Pet. App. 85a & n.11.

Shortly before Christmas 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, began a union-organizing campaign at petitioner's plant. Castro supported the organizing campaign and distributed authorization cards to co-workers. Pet. App. 5a; *Hoffman Plastic Compounds*, 306 N.L.R.B. at 102, 108. On January 31, 1989, petitioner laid off Castro and all the other employees who had engaged in organizing activities. Pet. App. 5a.

b. On January 22, 1992, the Board issued a decision finding that petitioner had unlawfully responded to the union's organizing campaign by discriminatorily selecting Castro and three other employees for layoff "in order to rid itself of known union supporters," contrary to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3).

The Board ordered petitioner to offer reinstatement to Castro and the other discriminatees, and to make them whole for lost earnings. Pet. App. 5a, 79a; *Hoffman Plastic Compounds*, 306 N.L.R.B. at 100, 107. Thereafter, petitioner entered into a stipulation with the Board's General Counsel, whereby petitioner waived its right to seek judicial review of the Board's January 22, 1992, order finding it in violation of the NLRA and ordering make-whole relief. Pet. App. 88a.

c. On March 4, 1993, the Board commenced a compliance hearing before an administrative law judge (ALJ). Pet. App. 88a; see also *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683 (1994). On June 14, 1993, the final day of the hearing, Castro testified that he was born in Mexico and that, in order to obtain employment with petitioner in 1988, he had tendered a birth certificate that "is not his own," but rather, "is for an individual born in El Paso, Texas." Pet. App. 79a-80a. He further testified that "[t]he birth certificate was loaned to me so that I can secure a job." *Ibid.* Based on Castro's testimony, the ALJ, in a decision that predated *A.P.R.A. Fuel*, recommended that Castro be denied reinstatement and awarded no back pay. *Id.* at 94a-95a.

On September 23, 1998, the Board reversed the ALJ's decision in part. Pet. App. 78a-87a. The Board found that petitioner "attempted to comply with IRCA when it hired Castro," that it "would not have offered Castro initial employment had it known of his unauthorized immigration status," and that it "did not learn until the back-pay hearing that Castro used fraudulent identification in applying for employment." *Id.* at 84a. Applying the "after-acquired knowledge rule" adverted to in *A.P.R.A. Fuel* (see pp. 6-7, *supra*), the Board concluded that "Castro is not entitled to reinstatement, and backpay shall terminate on June 14, 1993, the date [petitioner] learned that Castro used fraudulent identification to gain employment." *Id.* at 85a. Board Member Hurtgen, dissenting, would have denied Castro all back pay. *Id.* at 87a.

3. Petitioner filed a petition for review of the Board's order of September 23, 1998. Initially, a panel of the court of appeals denied the petition for review. Pet. App. 7a, 37a-77a. After rehearing the case en banc, the court again denied the petition for review and enforced the Board's order. *Id.* at 1a-36a.

a. The en banc majority noted that, in this case, the Board, applying its after-acquired knowledge rule, had "relieved [petitioner] of its reinstatement obligation altogether and cut off backpay at the moment Castro's status was discovered." Pet. App. 20a. Thus, "the Board had no need to adopt *A.P.R.A. Fuel*'s other remedy—the award of backpay while the discriminatees attempted to obtain documentation." *Ibid.* Accordingly, the majority explained, "the propriety of such an award is not before us." *Ibid.*

The majority rejected petitioner's contention that *Sure-Tan* "plainly prohibits" the Board from awarding any back pay to Castro. Pet. App. 7a. That contention, the court noted, is based on "a single sentence from *Sure-Tan*." *Ibid.*[3] The court concluded, however, that, "[r]ead in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees." *Ibid.* It explained that to construe that sentence as establishing

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[3] The relevant sentence reads: "[I]n computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Sure-Tan*, 467 U.S. at 903.

an absolute bar to back pay "would conflict with the Court's holding [in *Sure-Tan*] that an undocumented discriminatee is entitled to backpay so long as it is appropriately tailored to the discriminatee's actual loss." *Id.* at 8a.

The court also rejected petitioner's alternative contention that, "even if *Sure-Tan* does not bar backpay to undocumented discriminatees, IRCA does." Pet. App. 14a. The court explained that "IRCA neither amends nor repeals the NLRA or any other labor law," and that "IRCA's legislative history * * * shows that Congress did not intend the statute to limit the NLRA even indirectly." *Ibid.* And it rejected petitioner's contention that, even "[a]bsent a statutory bar * * * the Board's backpay award fails to accommodate IRCA's goal of limiting the hiring of undocumented workers." *Id.* at 16a. As the court explained:

> The Board crafted the limited backpay remedy to avoid conflict with IRCA and to implement its understanding of the purposes of both IRCA and the NLRA. According to the Board, the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA's goal), reinforces collective bargaining rights for all workers (the NLRA's goal), and protects wages and working conditions for authorized workers (the goal of both Acts).

Id. at 23a.

Finally, while the court acknowledged that IRCA "makes it unlawful for employers to knowingly hire undocumented aliens," it noted that IRCA does not "explicitly make it unlawful for undocumented aliens to work." Pet. App. 22a. Although "IRCA criminalizes the false use of documents to obtain employment" (*id.* at 20a), and "Castro could have been prosecuted for his fraud" (*id.* at 22a), the court observed that there was "nothing illegal about his actual employment" with petitioner. *Ibid.* Thus, the court majority concluded that, "when the Board ordered limited backpay, it was not compensating Castro for the loss of wages IRCA prohibited him from earning." *Ibid.*

b. Judge Sentelle, joined by Judges Henderson and Randolph, dissented. Pet. App. 24a-36a. Judge Sentelle would have ruled that *Sure-Tan* "definitively answered" the question before the court and would have required vacatur of the Board's back pay award to Castro. *Id.* at 27a. He also believed that the majority "essentially ignore[d]" the "statutory directives of IRCA," and improperly "cho[se] to mediate between [the] statutory 'goals'" of IRCA and the NLRA. *Id.* at 35a. Judge Ginsburg, in a separate dissenting opinion, agreed with Judge Sentelle that *Sure-Tan* "definitively answered the question" before the court, *id.* at 36a, and therefore found it unnecessary "to reach the question whether the Board reasonably reconciled the remedial scheme of the NLRA with the policies embodied in the IRCA," *ibid.*

ARGUMENT

In the lead case of *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 415-416 (1995), aff'd, 134 F.3d 50 (2d Cir. 1997), the National Labor Relations Board fashioned a limited back pay remedy for cases in which an employer, in violation of IRCA, initially hires an undocumented alien employee with knowledge that the employee is not authorized to work in the United States and then, in violation of the NLRA, discriminatorily fires that employee because of his activities in support of a union. In that situation, the Board has concluded

that the employer should be required to pay the discriminatee back pay commencing on the date of his discharge and running until the date on which he is reinstated—"subject to compliance with the [employer's] normal obligations under IRCA" to verify the alien's eligibility for employment in the United States—or until the discriminatee, after a reasonable period of time, fails to produce "the documents enabling the [employer] to meet its obligations under IRCA," whichever date is earlier. *Id.* at 416; see also Pet. App. 83a. The only court of appeals that has addressed the validity of that particular Board remedy has upheld it. See *NLRB* v. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57-58 (2d Cir. 1997).

The validity of the Board's *A.P.R.A. Fuel* remedy was not before the court of appeals in the present case. See Pet. App. 20a. Rather, the court of appeals below addressed a different Board remedy, which is based on the Board's long-established "after-acquired knowledge" rule. That distinct remedy is fashioned for application where the employer discovers after it has fired an employee in violation of the NLRA that the employee was not authorized to work in the United States at the time of hire, but rather, had secured the job using fraudulent identification documents. See *A.P.R.A. Fuel*, 320 N.L.R.B. at 416 n.44; Pet. App. 84a-85a. Applying that after-acquired knowledge rule in this case, the Board fashioned a remedy for the benefit of the discriminatee in this case: he was denied reinstatement outright, and his entitlement to back pay was terminated as of the date petitioner first acquired knowledge of his earlier fraudulent use of identification documents. See *id.* at 20a, 84a-85a. The court of appeals below addressed only the validity of the limited back pay aspect of the Board's remedy in this case, and

it is the only court that has addressed that precise issue. Moreover, the court of appeals correctly upheld the Board's limited back pay remedy. This Court's review is therefore not warranted.

1. a. The propriety of the Board's back pay order in this case is governed by three remedial principles. First, a back pay order is "a means to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 900 (1984) (quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941)); see also *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). Thus, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.*, 313 U.S. at 197; see *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952).

Second, "[i]n determining appropriate remedial action, the employee's wrongdoing becomes relevant." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (decided under Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*). Consistent with that principle, the Board has long held that, while a full back pay award is ordinarily warranted to remedy a discriminatory discharge, employment-related misconduct by the discriminatee may constitute "counterbalancing considerations" that "strongly weigh in favor of ordering something less than such a full remedy." *East Island Swiss Prods., Inc.*, 220 N.L.R.B. 175, 175 (1975). Thus, if the discriminatee "engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct." *Marshall Durbin*

Poultry Co., 310 N.L.R.B. 68, 70 (1993) (limiting back pay of discriminatee who had engaged in workplace sexual harassment), enforced in relevant part, 39 F.3d 1312 (5th Cir. 1994); cf. *Nashville Banner*, 513 U.S. at 362 (applying similar back pay limitation rule under ADEA).

Third, in devising remedies under the NLRA, the Board "may [not] wholly ignore other and equally important Congressional objectives," for, "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). Thus, in a case involving remedies for the benefit of undocumented alien employees, the Board's order "is obliged to take into account * * * the objective of deterring unauthorized immigration that is embodied in the INA." *Sure-Tan*, 467 U.S. at 903.

b. The limited back pay award fashioned by the Board in the instant case for discriminatee Castro is consistent with the foregoing remedial principles. First, had petitioner not laid off Castro in violation of the NLRA on January 31, 1989 (see Pet. App. 5a), he would have continued working for, and earning wages from, petitioner. By commencing Castro's entitlement to back pay as of the date of his discharge, the back pay award in this case properly places Castro, for a limited period of time, in the economic position he would have occupied, absent petitioner's unlawful conduct. See *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 265 (back pay award proper where "designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act"); cf. *A.P.R.A. Fuel*, 134 F.3d at 58 (Board's back pay remedy in that case properly "compensates [the undocumented discriminatees] for the

economic injury they suffered as a result of the [employer's] unlawful discrimination").

Second, the Board's limited back pay award in this case properly accounts for Castro's own employment-related misconduct. When Castro initially secured employment with petitioner in May 1988, he tendered false identification documents, contrary to IRCA. Pet. App. 84a-85a; 18 U.S.C. 1546(b)(1) and (2). Once petitioner discovered Castro's unauthorized work status on June 14, 1993, it could not have, consistent with IRCA, continued to employ Castro beyond that date (had he not already been laid off in violation of the NLRA). Accordingly, by terminating Castro's entitlement to back pay as of June 14, 1993, the Board properly placed Castro in the position he would have occupied on that date, given his own misconduct.

Third, the limited back pay award fashioned by the Board for Castro appropriately accommodates federal immigration law. IRCA prohibited petitioner from employing Castro after June 14, 1993, when it learned of his unauthorized immigration status—but not before that date, for at the time of his hire, Castro tendered to petitioner documents that on their face established his entitlement to work in the United States. See p. 5, *supra*. By cutting off Castro's entitlement to back pay as of June 14, 1993 (and by refusing to order reinstatement), the Board accounted for the fact that petitioner could not, consistent with IRCA, continue Castro's employment after that date. On the other hand, while IRCA prohibited petitioner from employing Castro once it had knowledge of his undocumented status, nothing in IRCA prohibits petitioner from paying Castro for work that he had previously performed or had been engaged to perform, or prohibits the Board from awarding back pay to an undocumented worker

who has been subjected to an unfair labor practice. And as the court of appeals observed (Pet. App. 14a), the legislative history of IRCA confirms that Congress "did not intend the statute to limit the NLRA even indirectly." The relevant report of the House Judiciary Committee explains that no provision of IRCA should "be used to * * * limit the powers of federal or state labor relations boards * * * to remedy unfair practices committed against undocumented employees for * * * engaging in activities protected by existing law." *Id.* at 15a (quoting H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 58 (1986)). Accordingly, in IRCA Congress left the Board's remedial powers where it found them.

2. Petitioner contends (Pet. 4-7) that the Board's limited award of back pay to Castro is barred by *Sure-Tan*, and that the decision of the court of appeals upholding that award conflicts with *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F.2d 1115 (7th Cir. 1992). The court of appeals' reading of *Sure-Tan*, however, is correct. Moreover, although the lower court's reading of *Sure-Tan* does conflict with the reading given by the Seventh Circuit in *Del Rey Tortilleria*, this case is not an appropriate vehicle for resolution of that disagreement by this Court.

a. Petitioner's contention (Pet. 4-5, 7) that *Sure-Tan* forecloses the Board's remedy in this case is based entirely on the statement in *Sure-Tan* that, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903. Petitioner overlooks, however, the context in which that statement was made. As the court below correctly explained, that

single sentence in *Sure-Tan* does not, and in context does not appear to have been intended to, establish a general rule of law applicable to all cases involving undocumented workers. See also *A.P.R.A. Fuel*, 320 N.L.R.B. at 411-412, 415-416.

Sure-Tan involved undocumented alien employees who were reported by their employer to the INS in retaliation for pro-union activities and who were immediately arrested by INS and granted voluntary departure (rather than deportation) from the United States. There was no evidence in the record whether the employees had returned to the United States, with or without authorization. Whereas the ALJ had declined to order any back pay based on a finding that the deported employees were "physically unavailable for work," the Board, noting the absence of evidence on that point, ruled that the ALJ erred in failing to order "the conventional remedy of reinstatement with backpay," and deferred the issue of the employees' availability for work to a compliance hearing. See *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1187 (1978).

On the NLRB's petition for enforcement, the Seventh Circuit limited in some respects and expanded in other respects the remedy ordered by the Board. The court limited the remedy of reinstatement to aliens who could show that they were present and lawfully authorized to be in the United States. 672 F.2d at 606. The court further stated that "in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Ibid.* The court noted, however, that "[i]n the circumstances of this case it may well be that the discriminatees will not have been lawfully available for employment in the United States prior to the date of the new offers of

reinstatement which will be required," and that "[i]n that event the discriminatees will receive no backpay." *Ibid.* Concluding that that result was inconsistent with remedial principles of the NLRA, the court ordered the Board to fix a minimum award of six months' back pay for the discriminatees, which the court estimated to be the period in which the employees would have escaped detection from the INS. *Ibid.*

This Court reversed the minimum award of six months' back pay that the court of appeals had ordered, on the ground that such an award would not be "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." 467 U.S. at 901. The Court did not accept the employer's argument (see 82-945 Pet. Br. 19-23) that, as a matter of law, *any* back pay award for the benefit of the discriminatees would be contrary to federal immigration law. The Court indeed "generally approve[d] the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902. But the Court also recognized that the discriminatees had left the United States, perhaps without authorization to return, and although it "share[d] the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able either to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period," *id.* at 904, it nonetheless concluded that the Board's remedies must effectively be "conditioned upon the employees' legal readmittance to the United States," *id.* at 903.

b. The court of appeals in this case correctly concluded that, "[r]ead in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees." Pet. App. 7a. Rather, "[t]he Seventh Circuit originally crafted the sentence"—which neither party contested in this Court—"to deal with unique circumstances of *Sure-Tan* not present in this case." *Id.* at 7a-8a. Thus, "the Seventh Circuit crafted the restriction to ensure that the *Sure-Tan* discriminatees who had left the country would not reenter illegally to claim backpay," *id.* at 11a, and to "ensure[] that illegal reentry would not restart the accumulation of backpay," *id.* at 9a.[4] Further, this Court's "expression of precisely the same concern" is manifested by its references to such matters as "the employees' *legal readmittance to the United States*," and "the employees' *legal reentry*." *Id.* at 11a (quoting 467 U.S. at 902-903; emphasis added by court of appeals).

The court of appeals also correctly concluded that reading the "not lawfully entitled to be present and employed" sentence in *Sure-Tan* "to impose an absolute bar to any award of backpay for undocumented discriminatees" would "conflict[] with other language" in this Court's *Sure-Tan* opinion that "generally approve[d] [of] the Board's original course of action * * * by which it ordered the conventional remedy of reinstatement and backpay, leaving calculation of the precise amount of backpay until the compliance proceeding." Pet. App. 11a-12a (quoting 467 U.S. at 902 (bracketed material added by court of appeals)). Thus,

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[4] The court of appeals noted that "[t]his limitation * * * was based on the Board's standard practice of tolling backpay when discriminatees are physically unavailable, including when out of the country." Pet. App. 9a (citations omitted).

as the court of appeals observed, the "'main deficiency' in the Seventh Circuit's order, the [*Sure-Tan*] Court explained, was not that it awarded backpay to undocumented discriminatees, but that the *amount* of backpay," *i.e.*, the minimum award of six months' back pay, "was 'develop[ed] in the total absence of any record evidence as to the circumstances of individual employees'" (*id.* at 12a (quoting 467 U.S. at 899-900 n.9, 900))—in particular, without any evidence as to "the period of time these particular employees might have continued working before apprehension by the INS." *Id.* at 12a-13a (quoting 467 U.S. at 902 n.11).

The Board's limited award of back pay to Castro in this case is consistent with *Sure-Tan*, properly understood in light of its unusual facts. Because Castro remained in the United States after his unlawful discharge by petitioner, awarding him limited back pay does not promote any illegal reentry. Nor is the back pay award speculative. The record in this case demonstrates that, absent his unlawful layoff on January 31, 1989, Castro would have continued working for petitioner until June 14, 1993, at which point the facts revealed by his testimony before the Board would have required petitioner to discharge him under IRCA.

The court of appeals' reading of *Sure-Tan* is also consistent with this Court's own discussion of that decision. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), this Court observed:

> [I]n *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien's illegal presence in this country. *Retrospective sanctions against the employer may accordingly be imposed by the*

> *National Labor Relations Board to further the public policy against unfair labor practices.* But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief—reinstatement and continued employment—that probably would be granted to other victims of similar unfair labor practices.

Id. at 1047-1048 n.4 (emphasis added). The *Lopez-Mendoza* Court's reference to the availability of "[r]etrospective sanctions" under *Sure-Tan*, as distinguished from the "prospective relief" of reinstatement, indicates that *Sure-Tan* does not categorically prohibit the Board from awarding back pay to undocumented aliens.

3. The court of appeals' interpretation of *Sure-Tan* is consistent with that of two other courts of appeals. In *A.P.R.A. Fuel*, 134 F.3d at 50, the Second Circuit, relying on its earlier decision in *Rios* v. *Enterprise Association Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (1988)—a case involving back pay for undocumented aliens under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[5]—understood *Sure-Tan* "as addressing only awards of

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[5] The courts of appeals that have addressed the issue have uniformly concluded (in cases that involved operative facts occurring before enactment of IRCA) that the decision in and reasoning of *Sure-Tan* do not preclude an award of back pay to an undocumented alien who has remained in the United States under either Title VII (see *Rios*, 860 F.2d at 1173; *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989)), the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (see *Patel* v. *Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989)), or a labor arbitration agreement (see *Bevles Co.* v. *Teamsters Local 986*, 791 F.2d 1391, 1393-1394 (9th Cir. 1986), cert. denied, 484 U.S. 985 (1987)).

backpay to undocumented employees who have left the country." 134 F.3d at 54. The Second Circuit concluded that, under *Sure-Tan*, "when undocumented employees remain in the United States after their illegal termination, backpay may appropriately be awarded." *Ibid.* In so concluding, the Second Circuit also relied (*id.* at 54-55) on *Local 512, Warehouse and Office Workers' Union* v. *NLRB* (*Felbro, Inc.*), 795 F.2d 705 (1986), in which the Ninth Circuit similarly concluded that "*Sure-Tan* barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers." *Id.* at 722.

As the court of appeals noted (Pet. App. 14a), "[o]nly the Seventh Circuit has interpreted *Sure-Tan* differently." In *Del Rey Tortilleria*, the Seventh Circuit rejected, for purposes of a remedy under the NLRA, the distinction between undocumented workers who have left the country and those who remain in the United States after their unlawful discharge. 976 F.2d at 1119-1120. The Seventh Circuit concluded instead that "the plain language of the Supreme Court's opinion [in *Sure-Tan*] bars undocumented aliens from receiving backpay." *Id.* at 1119.

Although the court of appeals' reading of *Sure-Tan* in this case does conflict with that of the Seventh Circuit in *Del Rey Tortilleria*, the instant case does not present an appropriate vehicle for this Court's resolution of that disagreement. In particular, this case involves thus far atypical facts, as contrasted with the remedial setting (where the employer knowingly hires an undocumented alien) addressed by the Board's lead decision in

A.P.R.A. Fuel.[6] Indeed, the court below expressly declined to address the question of the validity of the back pay remedy ordered by the Board in cases like *A.P.R.A. Fuel*. See Pet. App. 20a. This case involves only the Board's back pay remedy for undocumented discriminatees in the situation calling for an application of the Board's after-acquired knowledge rule. See *ibid.* No court other than the court of appeals below has addressed the validity of that precise back pay remedy; indeed, in *Del Rey Tortilleria*, the Seventh Circuit addressed a back pay remedy different both from the one at issue here and from the remedy involved in *A.P.R.A. Fuel*. See *Del Rey Tortilleria*, 976 F.2d at 1117 (reviewing Board order entitling undocumented workers "to reinstatement and backpay unless the employer could prove their illegal presence by means of a final INS deportation order"). Further review, if necessary, should await a case in which a court of appeals, based on *Sure-Tan*, rejects either the Board's *A.P.R.A. Fuel* remedy or the distinct limited back pay remedy fashioned by the Board in the instant case.

Second, this Court's intervention may not be necessary to resolve the issue presented in this case. Since it

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[6] The Board has applied its *A.P.R.A. Fuel* remedy in several cases since it developed that particular remedy. See *Regal Recycling, Inc.*, 329 N.L.R.B. No. 38 (Sept. 30, 1999), slip op. 3 (ordering *A.P.R.A. Fuel* remedy); *County Window Cleaning Co.*, 328 N.L.R.B. 190, 190 n.2 (1999) (same); *Victor's Cafe 52, Inc.*, 321 N.L.R.B. 504, 504 n.3 (1996) (leaving for compliance hearing "a determination of reinstatement and backpay in accordance with" *A.P.R.A. Fuel*); *Intersweet, Inc.*, 321 N.L.R.B. 1 n.2 (1996) (same), enforced, 125 F.3d 1064 (7th Cir. 1997). By contrast, except for the present case, the Board has not, to date, had occasion to order its different after-acquired knowledge remedy in a case involving undocumented discriminatees.

decided *Del Rey Tortilleria*, the Seventh Circuit has not had occasion to apply its decision in that case. In light of the subsequent rejection of its reading of *Sure-Tan* by the District of Columbia and Second Circuits in favor of more nuanced interpretations, the Seventh Circuit may elect to revisit the question in a future case. Indeed, even at the time *Del Rey Tortilleria* was decided, four judges of the Seventh Circuit voted to rehear the case *en banc*. See 976 F.2d at 1115 n.*.[7] Moreover, a panel of the Seventh Circuit is not necessarily bound by a prior panel decision, even absent rehearing en banc. See 7th Cir. R. 40(e).

4. Petitioner also contends (Pet. 13-14) that the court of appeals has effectively sanctioned employment of an undocumented alien in violation of IRCA. That contention is wide of the mark. IRCA makes it unlawful for an employer to hire an alien only if the employer does so "knowing the alien is an unauthorized alien" or "without complying with the requirements of" the "employment verification system" prescribed by Section 1324a(b). See 8 U.S.C. 1324a(a) (1)(A)-(B)(ii); 8 U.S.C. 1324a(b) (1994 & Supp. V 1999).[8] Because petitioner did not know that Castro was an unauthorized alien at the time it hired him, and because

[7] Judge Cudahy, who had written the Seventh Circuit's opinion in *Sure-Tan*, dissented from the *Del Rey* panel majority's reading of this Court's decision in *Sure-Tan*. Judge Cudahy pointed out that the "not lawfully entitled to be present and employed in the United States" language first appeared in the Seventh Circuit's opinion, and was addressed only to aliens who have left the country. *Del Rey Tortilleria*, 976 F.2d at 1123-1124 (Cudahy, J., dissenting).

[8] In similar fashion, an INS regulation makes clear that employers are not required to terminate undocumented aliens who were hired before the effective date of IRCA. See 8 C.F.R. 274a.7.

petitioner attempted to meet its verification obligations when it hired Castro (see Pet. App. 84a-85a), it was not unlawful under IRCA for petitioner to hire Castro and to employ him until it learned of his undocumented status.[9] There is also no merit to petitioner's suggestion (Pet. 13-14) that, insofar as the court of appeals held that IRCA does not preclude the Board from awarding limited back pay to Castro, its decision conflicts with *Del Rey Tortilleria*. In that case, the Seventh Circuit stated that IRCA "clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment." 976 F.2d at 1122. That statement, however, was dictum, inasmuch as the events at issue in that case occurred prior to the effective date of IRCA. *Id.* at 1121 n.6.[10] Indeed, the court itself expressly noted that, in light of that fact, "[i]t is quite clear that IRCA itself does not control the rights of [the discriminatees in that case] to receive backpay." *Ibid.* Accordingly, the Seventh Circuit's unsupported dictum about IRCA provides no basis for this Court's review.

[9] Under 8 U.S.C. 1324a(a)(3), an employer that "establishes that it has complied in good faith with" the verification requirements of Section 1324a(b) "has established an affirmative defense" that the employer has not violated the statute's prohibition against knowingly hiring unauthorized aliens.

[10] The court's dictum is also incorrect, because, as explained above, IRCA does *not* make it unlawful for an employer to hire an unauthorized alien in every circumstance. See pp. 4-5, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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